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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,
Appellants,

vs.

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

Appeal from the District Court of the United States for the District of New Jersey

BRIEF FOR APPELLEE, CITY OF JERSEY CITY

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SUPREME COURT OF THE UNITED STATES

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No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,

Appellants,

vs.

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

Appeal from the District Court of the United States for the District of New Jersey

BRIEF FOR APPELLEE, CITY OF JERSEY CITY

Opinions Below.

The opinions of the Court were rendered January 14, 1944 (R. 194-205).

The two reports and orders of the Commission which the Court enjoined are those bearing date June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272).

There are also involved in these proceedings the reports of the Commission of July 11, 1938, 227 I. C. C. 741 (R. 286), August 3, 1943, 256 I. C. C. 269 (R. 313), and September 18, 1943 (R. 351).

Jurisdiction.

Appellants have enumerated the statutes under which it is alleged jurisdiction has been conferred upon this Court. True, this is an appeal from a decree and order of the statutory court enjoining an order of the Commission, but it is to be observed here that the injunction was necessary in order to permit the proceedings to be "remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the court" (R. 220), and neither appellant has made any attempt to comply with this mandate but instead, has sought refuge by an appeal.

Statutes Involved.

Interstate Commerce Act (Sections 1 (1), 1 (5), 15a (1), 15a (2) and 15 (7), Title 49, Chapter 1, U.S.C.A.).

Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50 U.S.C. Secs. 901 et seq.).

Inflation Control Act (Stabilization Act) of 1942 (Act Oct. 2, 1942, Title 50, U.S.C. Secs. 961 et seq.).

Questions Presented.

The Commission, in an "Investigation and Suspension" proceeding instituted under Section 15 (7) of the Interstate Commerce Commission Act (U.S.C. Title 49) made various orders based on the revenue section of the act (U.S.C. Title 49, Sec. 15a (2)). In all of the proceedings herein referred to, the railroad sought to establish a ten cent fare on its downtown line. On July 11, 1938, the Commission permitted an increase from six cents to eight cents. On June 8,

1943, the Commission permitted an increase from eight cents to nine cents. Without any hearing, the Commission on August 3, 1943, modified the order of June 8, 1943, and permitted a further increase on the downtown line from nine cents to nine and one-eleventh cents, if tokens were purchased requiring an expenditure of $1 for eleven tokens, or ten cents in cash for passengers unwilling to make a purchase of tokens.

After litigation had been instituted by Jersey City charging a denial of a full and fair hearing, the Interstate Commerce Commission reopened the proceedings by its order of September 18, 1943[1]. The "investigation and suspension" proceedings having been reopened, and having in mind the fact that all of the fare orders involved were based upon the revenue section of the act, Jersey City offered testimony dealing directly with revenue, income and expenses of the railroad and also offered to prove that the traffic of the railroad had increased by 30 per cent over 1941, which latter fact the Commission stated in its report of June 8, 1943, would result in the railroad meeting its interest requirements on its bonded indebtedness. Such testimony, however, was not admitted in evidence by the examiner. His ruling was sustained by the Commission despite the direct statement in the order of June 8, 1943, that any party is at liberty to bring to the attention of the Commission facts with respect to any changed condition (R. 271). The examiner refused this testimony on the ground that it was not within the scope of the order of September 18, 1943, reopening the proceedings. The Commission not only concurred in this refusal but prejudged the evidence and stated in its order of November

[1] Order of September 18, 1943, is entitled "Investigation and Suspension Docket No. 4394", (R. 351).

2, 1943, permitting the increase to stand, that "considering the contents of the motion now before us and the offer of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held we would feel warranted in modifying our findings as made in the second (November 2, 1943) report" (R. 275).

This presents the question whether the Commission having opened the "investigation and suspension" proceedings for further hearing was justified in refusing to accept relevant testimony and pre-judge such testimony without knowing its full import and affect and making an order for an increased fare without any findings or evidence that such increase is necessary to render adequate and efficient railroad transportation service at the lowest cost consistent with the furnishing of such service, and as to the need of revenue sufficient to enable the carrier under honest, economical and efficient management to provide such service.

Facts.

(A) History of proposed ten cent local interstate fare culminating in order of June 11, 1938 (R. 286).

Prior to April, 1920, the fares of the Hudson & Manhattan Railroad Company for local interstate transportation between Jersey City and New York were five cents on the local downtown line and seven cents on the local uptown line. In April, 1920, the railroad proposed to establish a flat fare of eight cents between its Jersey City and Hoboken stations on the one hand, and all stations in New York City on the other. The Interstate Commerce Commission frowned upon a flat fare of eight cents because

such fare "does not coincide with the respective mileage traversed by the passenger through the tubes to uptown stations and to the downtown terminal." The Commission thereupon suggested a six cent fare downtown and a ten cent fare uptown, which fares were finally adopted and approved after formal hearings. *Local Fares of Hudson & Manhattan Railroad Company,* 58 I.C.C. 270. The six cent and ten cent fares so approved by the Interstate Commerce Commission in April, 1920, continued in effect without change down to July 31, 1937.

By schedule designated as Hudson and Manhattan Railroad I.C.C. 42, filed with the Interstate Commerce Commission on July 31, 1937, to become effective September 1, 1937, the railroad sought to effectuate a fare of ten cents for the interstate transportation of passengers on both the railroad's downtown and uptown line, in lieu of the then existing interstate fares of six cents on the downtown line and ten cents on the uptown line.

As a result of protests filed by numerous commuters and the municipalities of Jersey City, Hoboken, Bayonne, Harrison, Secaucus, North Bergen, and others, pursuant to the provisions of Section 15(7) of the Interstate Commerce Act (U. S. C. Title 49, Section 15(7)), directly bringing into issue the legality of the proposed fares under Sections 1 and 3 of the Interstate Commerce Act, the proposed schedules were suspended and the subject matter thereof set for formal hearing before the Interstate Commerce Commission in a proceeding entitled *Investigation & Suspension Docket No. 4394, Passenger Fares, Hudson & Manhattan Railroad.*

After a full and complete hearing the Interstate Commerce Commission, on July 11, 1938, issued its report and order, 227 I.C.C. 741, finding that the proposed increase in

the local downtown fare from six to ten cents had not been justified but that a fare of eight cents would be proper. In holding that the fare of ten cents, for application to the local downtown passenger, had not been justified, the Commission, in its report and order 227 I.C.C. 741, made the following findings:

1. "The proposed fare of ten cents would be unreasonable under sections 1 and 15a of the Act and has not been justified." 227 I.C.C. 741, 762. (R. 311.)
2. "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than ten cents." 227 I.C.C. 741, 754. (R. 302.)
3. "If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic." 227 I.C.C. 741, 762. (R. 311.)

As is thus apparent, for the second successive time, the Commission condemned as unreasonable the maintenance of the same fare on the downtown line as concurrently existed for application on the uptown line because of the tremendous disparity in the respective uptown and downtown services rendered.

Following the promulgation of the report and order of the Interstate Commerce Commission as aforesaid, 227 I.C.C. 741, the railroad, on July 25, 1938, effectuated the prescribed eight cent fare on the downtown line which has since been maintained concurrently with the ten cent fare on the uptown line. Following this report and order of the

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Interline traffic refers to passengers traveling over the joint facilities of the Hudson & Manhattan Railroad and Pennsylvania Railroad.

Interstate Commerce Commission, the railroad appealed to the courts to enjoin the effect thereof, It filed a complaint in the Southern District of New York which was dismissed because of improper venue, *Hudson & M. R. Co.* v. *U. S.* 28 Fed. Supp 137. Thereupon the railroad filed its complaint in the United States District Court for the District of New Jersey and after hearing, the complaint was dismissed, the court upholding the order of the Commission. *Hudson & M. R. Co.* v. *United States*, 33 Fed. Supp. 495. The railroad's appeal to this Court resulted in an affirmation both of the District Court's findings and the report and order of the Interstate Commerce Commission, *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98.

Section 1(5)(a) of the Interstate Commerce Act (U.S.C. Title 49, Section 1(5)(a)) provides that all charges for service must be just and reasonable, and every unjust and unreasonable charge is unlawful.

Section 3 of the Interstate Commerce Act (U.S.C. Title 49, Section 3) declares unlawful any action by a common carrier which in effect makes, gives or causes any undue or unreasonable preference or advantage to any particular person or description of traffic or to subject any particular person or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Because the burden of proof devolved upon the railroad to justify the proposed increased fare (U.S.C. Title 49 Sec. 15(7)) and realizing that the proposed ten cent fare could not be justified under Sections 1 or 3 of the Act as aforesaid, the railroad sought refuge under the provisions of Section 15a(2) of the Act. That section (U.S.C. Title 49, Sec. 15a(2)) provides as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates

on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Recognizing the requirements of Section 15a(2) of the Act, the Commission narrowed the issues involved, and in its report of July 11, 1938, clearly indicated that it based its determination upon the revenue requirements of the act. It stated:

> "Admitting the need for increased revenue two questions present themselves: First, is the proposed increased fare reasonable from the standpoint of the value of the service to the public; and second, would it produce the needed additional revenue or would some other fare be more likely to produce the desired result? In determining the latter question, consideration may be and should be given to whether any railroad service of respondent, other than the local downtown service, can be made to, and should be expected to, contribute some or all of the additional revenue needed." (R. 301.)

The narrowing of the issues was consonant with the established rules that in according relief under Section 15a(2) two primary findings of fact must be made by the Commission. The first is a determination of the carrier's needs for additional revenue; the second, if it is found that the carrier needs additional revenue, the Commission must find the specific amount thereof required and the method of allocation of the deficit. In other words the Commission must determine what portion of the deficit found to exist should be borne by the portion of the road under consideration. The Commission in its said report and order of July

11, 1938, made such a specific finding of revenue needs and determined that the maximum amount thereof that could properly be charged to the local downtown line was two cents and it accordingly authorized an increase in the then applicable local downtown interstate fare of six cents to the present level of eight cents. The Commission further found that the remaining specified revenue deficit should be and must be allocated against the interline traffic (traffic moving jointly over the facilities of the Pennsylvania Railroad and the Hudson & Mathattan Railroad).

The findings of the Interstate Commerce Commission of June 11, 1938, 227 I.C.C. 741, referred to above, fully complied with the statutory requirements of a revenue proceeding. Accordingly when that decision condemned the proposed ten cent fare it obtained affirmation by the District Court as well as the United States Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S., supra.*

(B) The order of June 8, 1943 (R. 248) and events leading up to the hearing of September 28, 1943.

On July 27, 1942, the railroad filed a petition with the Interstate Commerce Commission requesting further hearing relative to its proposed fare increase. It sought permission to depict alleged changed conditions, and as a result thereof to publish and charge a ten cent fare on its downtown interstate local line. Further hearings were held and as a result thereof the Interstate Commerce Commission issued its decision of June 8, 1943, 255 I.C.C. 649, wherein it affirmed its original conclusion that the proposed fare of ten cents was unjust and unreasonable and had not been justified. (R. 271.) Because of factors then existing, principally precipitated by abnormal war time conditions,

the Commission concluded that an increased local downtown fare of nine cents was justified for application during the remaining period of the war and six months after the termination thereof. In its determination as aforesaid the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached." (R. 270.)

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision." (R. 270.)

(3) "While there can be little doubt that under present conditions a further increase in this (8-cent) fare, even to 10 cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic." (R. 270.)

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an 8-cent or a 9-cent fare than for a 10-cent fare on the downtown line of respondent." (R. 270.)

On July 8, 1943, the railroad filed a petition seeking reconsideration and modification of the findings of the Commission in its report dated June 8, 1943. That petition,

through the medium of an affidavit attached thereto and made a part thereof (R. 327), sought to secure modification of that portion of the Commission's order which authorized the collection of a nine cent local downtown fare because of an alleged disability on the part of the railroad to collect such fare with available fare collection devices. By means of this petition the railroad sought, pending the procurement of tokens which were to be sold eleven for one dollar with an alternative cash fare of one dime, authorization to charge a cash fare of ten cents on the downtown line the same as that in effect on the uptown line. Such cash fare of ten cents was to continue in effect indefinitely until the railroad obtained the necessary tokens and made suitable arrangements for their use. As a corollary proposition the railroad proposed that if its request were granted it would reduce the uptown line fare from ten cents per passenger to eleven tokens for one dollar with an alternative cash fare payable only by a dime. In other words, it proposed once more uniform uptown and downtown fares.

The City of Jersey City and the Office of Price Administration seasonably answered the railroad's petition and, in requesting denial thereof, prayed that before any affirmative action be taken that the proceeding be set for further hearing to give all parties their requisite day in court on the new matters therein alleged and that the parties be granted their full right of cross examination. (R. 345, 352.) On August 3, 1943, upon the facts as aforesaid, without further hearing or other action, the Commission issued its report and order on reconsideration. Such report affirmed their prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but nevertheless permitted the increased local fare on the downtown line prayed for by the railroad, namely an alternative

fare of eleven tokens for one dollar or a cash fare of ten cents. Such permissive increase was expressly coupled with the proviso that concurrently with the establishment and maintenance thereof, the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents payable by a dime, be established and maintained for application on the interstate uptown local line. This finding was made despite the fact that the fare on the interstate uptown line was never brought into issue.

The Commission's order of August 3, 1943, which authorized the effectiveness of the alternative fare basis, as aforesaid, contained the following statement:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate." (R. 325.)

The original report and order of the Commission made on July 11, 1938, 227 I.C.C. 741, contained the statement that if the railroad "should feel impelled to seek a further increase in revenue (over and above the eight cent downtown fare therein prescribed) it should consider doing so on interline traffic." (R. 311). The Commission's decision containing such directive was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *United*

States, supra, and affirmed by the Supreme Court of United States, *Hudson & Manhattan R. Co.* v. *United States, supra.* A similar directive by the Commission to the railroad to increase its revenue through adjustments in its interline divisions with the Pennsylvania Railroad appeared in the Commission's orders of June 8, 1943, 255 I.C.C. 649 (R. 270), and August 3, 1943 (R. 325). No affirmative action was taken by the railroad to comply with the Commission's directives.

On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey seeking to have enjoined the report and order of the Interstate Commerce Commission dated August 3, 1943. An application was contemporaneously made for a temporary restraint against the effectiveness of the Commission's order of August 3, 1943, and a statutory court was duly convened to hear said application.

Prior to any hearing, and before the statutory court convened as aforesaid, the Interstate Commerce Commission on its own motion, by order dated September 18, 1943, reopened the proceedings for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto . . . the right to cross examine adverse witnesses." (R. 351.)

(C) The hearing of September 28, 1943, and report of November 2, 1943.

Pursuant to the order of the Commission dated September 18, 1943, as aforesaid, the Commission's report and order of August 3, 1943 was reopened and the proceeding was

assigned for further hearing on September 28, 1943. The further hearing was restricted and limited by the terms of the Commission's order of September 18, 1943, as above quoted and as reiterated by the presiding examiner at the opening of the hearing. The appellees, City of Jersey City and the Office of Price Administration, objected to the limitations and insisted, from the very start of the hearing and repeatedly throughout the proceeding, that the announced scope of the hearing be enlarged to embrace all of the issues that necessarily required consideration before issuance of a revenue finding. It was requested that the issues be enlarged to permit the inclusion of evidence relating to the railroad's revenues, expenses and earnings as well as traffic patronage and classes thereof, since the close of the previous hearings. Objection was raised and exception taken to the trial examiner's refusal to receive any testimony with respect to the railroad's revenue except testimony confined strictly to the difference in revenue resulting from the nine cent authorized cash fare and the alternative token and ten cent cash fare basis.

It was the position of the City of Jersey City that the reopened hearing of September 28, 1943, continued to be an integral part of the revenue proceeding initially precipitated by the original filing of the proposed increased ten cent fare on July 31, 1937, and therefore the duty continued to devolve upon the railroad to justify the increased fare.

The railroad made no effort to prove that the proposed increased fare complied with Sections 1 and 3 of the Interstate Commerce Act. Instead it continued to seek protection under Section 15a(2). Thereupon, the City of Jersey City contended that, inasmuch as under the hearing order, the Commission still sought justification for the increased fares proposed, such justification could be found only under

Sections 1 or 15a(2) of the Act. The carrier, however, offered no proof under Section 1. Section 15a~~(2)~~ was thus the only remaining section applicable. It was thus incumbent that the Commission make revenue findings, the first that the carrier needed additional revenue, second, the amount of such additional revenue and third the proper and judicious manner of allocating it. In order to make such revenue findings, revenue testimony and evidence were essential. The City of Jersey City and the Office of Price Administration sought to introduce all of such testimony and evidence that was within their possession and knowledge and urged the railroad to submit such evidence and testimony perculiarly within its own knowledge. That evidence and testimony, it was contended was properly within the scope of the further hearing. The City of Jersey City and the Office of Price Administration, however, were denied the right to introduce any and all of such pertinent testimony and evidence, which if received would have established that the then present revenues of the railroad were sufficient in and of themselves to care for all current monetary requirements, including full interest on the bonded indebtedness. Therefore from a revenue standpoint the existing local downtown fare of eight cents was sufficient *per se*.

The revenue position of the railroad is advanced as justification for the alleged need of an increased downtown fare in the Commission's decision of June 8, 1943, 255 I.C.C. 649, as follows:

> "Under present fares (eight cents on the local downtown interstate line and ten cents on the local uptown interstate line) it would be necessary for its annual traffic to increase by about 30 percent over that of ~~respect thereto to our attention at a further hearing."~~ ~~(R. 271.)~~

1941 in order to meet the correct interest requirements in its bonded indebtedness (R 255)

The City of Jersey City sought, at the hearing of September 28, 1943, to introduce by exhibits and oral testimony proof that for the first six months of 1943, using actual patronage figures, the railroad enjoyed an increase of thirty percent over the corresponding period of 1941. Therefore, predicated upon the railroad's own estimates and the Commission's findings, as above quoted, (in 1943 actual patronage exceeded that of 1941 by thirty percent) it needed and needs no other or additional monies over that produced by the current downtown fare of eight cents to meet the interest on its bonded indebtedness. Accordingly, it was contended that revenue needs cannot be used as justification for the prescription of any local downtown fare in excess of eight cents. (Exhibit P-1, pages 2149, 2150.)

At the same hearing there was sought to be introduced into evidence a "condensed income statement" of the railroad covering the months of July, 1942, and July, 1943, and the first seven months of 1942 and 1943 respectively. This exhibit, like the exhibit of patronage above referred to, was excluded from the record. The condensed income statement showing the repeatedly improving financial position of the railroad, even considering all its alleged operating expenses, was offered to establish that at the existing eight cent fare the railroad was earning more than the Commission anticipated it would earn at the nine cent fare in its order of June 8, 1943, 255 I.C.C. 649.

It was and is the contention of the railroad that the increased revenue herein sought is due largely to increased operating expenses precipitated by war time conditions. It was and is the position of the City of Jersey City and the Office of Price Administration that by far the largest increase in the railroad's patronage was and is in its interline traffic and that such interline traffic should bear its fair share of the increased operating expenses. While the railroad

agreed to submit traffic studies setting forth a comparison of its present and past local patronage it refused to include therein facts relative to its interline patronage. The City of Jersey City and the Office of Price Administration were precluded from adducing information with respect to the interline traffic. This information obviously had and has a direct bearing upon the Commission's directive to the railroad to seek additional revenue by increased divisions from the Pennsylvania Railroad in its interline arrangements. If such probative and material testimony had been received it would have established that the railroad was derelict in its obligations of conserving its sources of revenue because it failed to make the joint interline contribute reasonably to the railroad's earnings commensurate with the services the railroad contributed to the joint service.

The railroad claimed that it was and is incurring an alleged expense of Twenty Thousand Dollars ($20,000) a month for war insurance which the Office of Price Administration contends was and is excessive and unreasonable. Testimony and evidence were precluded which would have established not only the excessive nature thereof but the additional fact that if the excess amount of such insurance cost were eliminated, the railroad would earn, at the existing eight cent fare, far in excess of all interest charges. Such current earnings were not anticipated by the Commission when it prescribed the nine cent fare in its order of June 8, 1943, 255 I.C.C. 649.

The order of the Interstate Commerce Commission of June 8, 1943, 255 I.C.C. 649, contained the statement:

> "It should be understood that if at any time prior to the expiration of that period (the duration of the war and six months thereafter) by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those

estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing." (R. 271.)

Notwithstanding the above statement contained in the report and order of June 8, 1943, *supra*, the trial examiner precluded and prevented the City of Jersey City and the Office of Price Administration from bringing to the attention of the Commission the changed and different facts and conditions. It was also alleged, although the parties were precluded from introducing proof because of the circumscription of the issues involved at the rehearing, that the nine cent local downtown interstate fare, authorized by the Commission's decision of June 8, 1943, *supra*, was productive of revenues over and above those to which the carrier was legally entitled or actually required, that *ipso facto*, the proposed alternative basis sought to be established by the railroad and approved by the Commission in the report and order of November 2, 1943, *supra*, also produced excessive revenues substantially over and above those required by the railroad.

On October 14, 1943, the Office of Price Administration, pursuant to the suggestion of the trial examiner who presided at the hearing of September 28, 1943, filed with the Interstate Commerce Commission a written motion for modification and amendment of the order of September 18, 1943, limiting and confining the issues of the further hearing to be effectuated by a further unlimited hearing. In that motion the City of Jersey City joined by letter. (R. 389.) The motion requested the reopening of the proceeding to permit the City of Jersey City and the Office of Price Administration to introduce the evidence excluded by the examiner and such other and additional evidence as might be necessary to bring the record, now alleged to be obsolete

and stale, down to date. That motion was overruled by the Commission in its "Second report on further hearing," issued November 2, 1943 (R. 275), wherein the Commission in addition to overruling the aforesaid motion granted the railroad's petition to substitute token and cash fares, the token fares to be sold at eleven for one dollar and the alternative cash fare to be paid only by a dime.

In treating with the offer of the City of Jersey City and the Office of Price Administration to submit evidence concerning the revenue situation of the railroad, mandatorily vital in a Section 15a(2) proceeding, the Commission said, in its report and order of November 2, 1943:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearings sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear the alternative fare basis herein approved cannot be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled." (R. 275.)

In other words the Commission not only prejudged what its attitude would be after the receipt of the testimony sought to be introduced but felt justified in estimating the revenue yield without the benefit of the underlying information without which any revenue estimate is improper.

The order of the Commission of November 2, 1943, notwithstanding the controversial character of the proceeding, permitted the railroad to depart from the usual statutory rule (U.S.C., Title 49, Sec. 6(3)), which requires effectuation of rate changes on thirty days notice after filing with the

Commission and in lieu thereof permitted the railroad to file and make effective the new tariff providing for the alternative fare basis on fifteen days notice.

Summary of Argument.

1. The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission.

(A) They were denied the right to introduce testimony and evidence under Section 15a (2) which must form the basis for any revenue award under that section;

(B) They were denied the right to introduce testimony and evidence which the Commission in its report and order of June 8, 1943, invited them to do and which went directly to the basis of that order.

2. By its hearing order of September 18, 1943, reopening the proceedings for further hearing on September 28, 1943, the Interstate Commerce Commission actually reopened the revenue phase of the proceeding.

3. The Commission's order of November 2, 1943, makes findings of fact allegedly predicated upon the evidence of record, but neither the findings of fact nor the evidence of record are within the confines of the Commission's legal authority under 15a (2).

4. Before appellant railroad is entitled to any increased fares under the revenue section of the act it must, among other factors, affirmatively establish its need of revenues sufficient to enable it under honest, economical and efficient management to provide adequate service at the lowest cost consistent with such service.

5. The imposition of a cash fare of ten cents for the

downtown local service is unreasonable, and unduly discriminatory and in violation of the Interstate Commerce Act.

6. The appellees exhausted all administrative remedies before instituting proceedings in the District Court.

7. Jersey City was not estopped from either asking the Commission to receive the tendered evidence or from seeking an injunction based on the Commission's refusal to receive such evidence, nor is it estopped from seeking an injunction against the order of the Commission of June 8, 1943.

Argument.

1.

The City of Jersey City and the Office of Price Administration were deprived of a full and fair hearing.

It is clear that the Interstate Commerce Commission having been created by an act of Congress for the purpose of promoting and facilitating commerce has only such powers and rights as were specifically delegated to it by Congress in enabling legislation, the Interstate Commerce Act. It is chargeable with the specific duties and requirements set forth in the said Act. The Commission can only act pursuant to the statute. To the extent that it seeks to perform acts not specifically authorized by the Interstate Commerce Act or to the extent that it actually acts in contravention of the specific requirements of the Interstate Commerce Act, its action becomes a nullity.

Texas, Etc. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 197;
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 73 F. 409.

The Interstate Commerce Act, Section 15(1) (U. S. C. Title 49, Sec. 15(1)) requires that all orders of the Interstate Commerce Commission resulting from a proceeding comparable with proceedings *sub judice*, shall be the result of a "full hearing." In *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 Sup. Ct. Rep. 185 at page 93, this Court said:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. v. Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 286 U. S. 14."

The notice of further hearing herein dated September 18, 1943 (R. 351), which resulted in the hearing of Septem-

ber 28, 1943, limited and restricted the issues to the precise pattern of facts raised by the railroad's petition of July 8, 1943. It is most unusual for a reopened proceeding before the Interstate Commerce Commission to be confined and limited to the precise scope of issues raised by one party to the litigation. *Sinclair Crude Oil Purchasing Co.* v. *Atchison T & S F Ry. Co.*, 168 I.C.C. 449, The limitations upon the admissible testimony clearly portray a predetermined intent to preclude evidence dealing with the need for carrier revenue or the amount or allocation thereof. The reopened proceeding of September 28, 1943, as limited, was not concerned with the legal necessity of determining whether it was appropriate to increase fares under Section 15a(2) of the Interstate Commerce Act nor whether any other section of the act would countenance or justify the prescription of increased fares in the light of existing facts. The allegations and contentions of the City of Jersey City and the Office of Price Administration, that the record in the proceeding was stale because of changed conditions affecting the carrier's revenue were relegated to a position of immateriality or non-existence under the limited issues guiding the further hearing. The preclusion of the receipt of probative revenue testimony and evidence was in complete variance with the principle enunicated in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 284 U. S. 248, and the language of Mr. Chief Justice Hughes, at page 262 thereof is appropriate here:

> "We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

In the last cited case this Court in speaking of the functions of the Interstate Commerce Commission also stated, at page 262:

> "In the discharge of its duty a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. In the instant proceeding the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions was denied."

The appellant, Interstate Commerce Commission, in its brief refers to *United States* v. *Northern Pacific Ry. Co.* 288 U. S. 490, as justification for the contention that appellees had a full and fair hearing. In the case cited the court dismissed the proceeding because the parties "sat silent and took the chance of a favorable decision on the record as made." We did not sit silent. We endeavored to submit the testimony at the reopened hearing. We were precluded from doing so. In the *United States* v. *Northern Pacific Ry., supra,* the parties chose not to submit the evidence. They were at liberty to do so. We sought to submit it. We were prevented from submitting it.

The case at bar is also entirely distinguished from *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, referred to on page 40 of the brief for appellant, Interstate Commerce Commission. There the question involved the refusal to reopen a hearing in a case where no change of condition was even alleged. In this case the principal complaint of the appellees before the District Court was not that the Commission refused to reopen the proceeding but that the Commission did reopen the proceeding and that at such reopened proceeding it refused to accept testimony and evidence directly in issue, of a material, probative and vital character. If it can be said that the court's action in *Atchison, T. & S. F. Ry.* v. *United States, supra,* was taken because "The *Atchison* case rests upon its exceptional

facts", then obviously this case rests upon facts even more exceptional, more drastic than those in the *Atchison* case. The issue herein is not whether this Court should interfere "with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing," the issue involved in *Baltimore & Ohio R. Co.* v. *United States, supra,* but whether this Court shall interfere with the Commission's action in refusing to grant all parties to the proceeding equal opportunity of presenting testimony and evidence relating to the matter in issue.

A full hearing has been defined by this Court in the *New England Division Case,* 261 U. S. 184, at page 200, as follows:

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

As we shall herein establish, the testimony and evidence, which the City of Jersey City and the Office of Price Administration sought to adduce, possessed highly probative value and as a matter of fact was of such nature that in the absence thereof the record is barren of facts sufficient to justify any revenue finding. Hence, appellees were deprived of their clear right to a full and fair hearing.

(A) The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission because they were denied the right to introduce testimony and evidence under Section 15a (2) which must form the basis for any revenue award under that section.

At the very outset it should be made apparent that appellees' principal claim that they were deprived of a full and

fair hearing was predicated on their inability, because of the examiner's rulings during the September 28, 1943, hearings, to introduce material, pertinent and probative matter clearly within the scope of the reopened hearing.

The reopened hearing of September 28, 1943, was for the purpose of establishing a record to justify or preclude a modification of a previously prescribed fare. Although the hearing notice indicated that the hearing would be held to secure justification for an upward modification, it must also be held that its purpose was to secure the basic and true facts upon which a determination could be predicated. To hold that the hearing was to be one sided only, i.e., merely to receive the railroad's testimony as to the need for the increased fare while denying the appellees the right to introduce rebuttal testimony or evidence showing the lack of need for an increased fare, would in and of itself constitute arbitrary action and lead to the conclusion that appellees were denied a full and fair hearing.

Appellees participated in the September 28, 1943 hearings, on the premise that the proceedings were reopened with respect to the issue of whether the previously authorized fare should be increased as proposed or if not, what fare should be substituted therefor. That was a fair interpretation of the hearing notice of September 18, 1943. The preclusion of testimony and evidence, hereinafter shown to be vital, even under the hearing order of September 18, 1943, was a clear indication that the sole purpose of the hearing of September 28, 1943, was to pretend to satisfy appellee's objections that they were being deprived of their day in court. A pre-trial determination that only evidence justifying an increased fare shall be received, obviously does not precipitate a full and fair hearing which ostensibly is called to impartially determine the merits of

the cause of action. To that extent, therefore, the appellees were deprived of their full day in court and a full and fair hearing.

It is agreed that this proceeding is wholly in the nature of a revenue proceeding and accordingly governed entirely by the requirements of Section 15a (2) of the Interstate Commerce Act which provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

In *Industrial Railways Case*, 29 I.C.C. 212, the Interstate Commerce Commission in enunciating the doctrine of law applicable to a revenue proceeding said:

> "No substantial part of the well informed public would deny to owners of railroads a reasonable return on their investments but before they may fairly ask the general public to share further in carrying their burdens the railroads must properly conserve their sources of revenue by making every service rendered contribute reasonably to their earnings. This having been done, the Commission upon adequate showing of the need of additional revenues will sanction measures required to bring reasonable prosperity so far as may be accomplished under rates and charges reasonably just alike to shippers and carriers."

In the Commission's report and order of July 11, 1938, 227 I.C.C. 741 which was reviewed by the courts the Com-

mission fully complied with the statutory requirements. It made a specific finding of the revenue needs of the carrier, after complete analysis of the income and expenses. Thereupon it determined that a deficit existed and specifically set about to allocate such deficit. The record contained the underlying data which were and are required for making such necessary findings. The Commission specifically found therein that the eight cent downtown fare would produce $2,260,817 (R. 311) or approximately $541,000 less than the railroad needed (R. 292). Then the Commission stated that the railroad, if it desired additional revenue, obviously referring to the $541,000, should consider obtaining it from the interline traffic (R. 311). This directive to obtain the deficit from the interline traffic was obviously predicated upon the interline traffic then existing.

The question of the allocation of any existing deficit was and still is a vital function of the Interstate Commerce Commission in a revenue proceeding. Nevertheless the Commission refused to accept any testimony or evidence relative to the current interline patronage of the railroad; this despite the fact that the appellee, City of Jersey City, was ready, willing and able, at the September 28, 1943, hearings, to submit such evidence. Without it the Commission was powerless to make an allocation of revenue deficit.

It is contended that at the oral argument, preceding the decision of June 8, 1943, certain traffic and revenue statistics were stipulated into the record. These traffic statistics, consisted wholly and solely of (1) the aggregate number of passengers using the Hudson & Manhattan Railroad's facilities during the months of January and February, 1943, and (2) the gross revenue accruing therefrom to the Hudson & Manhattan Railroad. No statistics, of any nature, exists in this record relative to the expenses of the Hudson

& Manhattan Railroad or the number of interline passengers using the Hudson & Manhattan facilities during 1943, or any month thereof. There is nothing in this record that would enable the Commission to make a finding as to the proportionate liability of the interline traffic for any deficit that might exist. This is so even though the Commission stated in its report and order of June 8, 1943, 255 I.C.C. 649:

1. "That under n rmal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached" (R. 270).

2. "While there can be little doubt that under present conditions a further increase in this (eight-cent) fare, even to 10 cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic" (R. 270).

The Commission specifically found that the record in these proceedings did not justify requiring the downtown local passengers to bear the entire burden of increased operating costs. Nevertheless, while stating that the interline traffic should bear its proportionate share thereof the Commission refused to permit any evidence into the record which would enable it to make a determination of the amount of the share that the interline traffic properly should bear. Had the City of Jersey City not been precluded from submitting testimony on this point, it would have established that the interline traffic for the first six months of 1943 reflected an increase over 1941 of 58.8 per cent. Because of the limitation imposed upon Jersey City,

it was never able to submit such factual matter to the Commission which accordingly never had the benefit thereof.

To support a finding that increased revenue may accrue to a railroad under Section 15a(2), the Act specifically requires that a correlated finding be made that the railroad is efficiently and economically managed. Not only is there no evidence in this record to support such finding but the record precludes the propriety of a finding that the carrier is efficiently and economically managed. Although the appellees specifically requested the Commission to make a finding, in accordance with the statute, that the railroad was and is not efficiently and economically managed, the Commission made no finding with respect to this essential point.

Since July 11, 1938, the Commission has directed the carrier's attention to the propriety of securing increased revenue from interline traffic. If the railroad was unable to effectuate such increase in its divisions of the joint line traffic through voluntary measures, ample relief was and is provided under Section 15(3) of the Interstate Commerce Act (U. S. C., Title 49, Sec. 15(3)), which provides that the Commission may establish joint fares and "the division of such fares or charges as hereinafter provided and the terms and conditions under which such through routes shall be operated."

Effective February 10, 1942, as a result of the authorization of the Interstate Commerce Commission to railroads generally in *Increased Railway Rates, Fares, and Charges*,

1942, 248 I.C.C. 545[1], the interline passenger fares of the Pennsylvania Railroad and Hudson & Manhattan Railroad (between Newark, N. J., and New York) were increased by ten per cent. It is estimated (because the appellee, City of Jersey City, was precluded from adducing the actual facts relative hereto at the hearing of September 28, 1943), that the minimum amount of this increase, is $511,600. Although the Hudson & Manhattan Railroad is entitled to its share of the joint line revenue, every cent of the increase has been retained by the Pennsylvania Railroad. The Hudson & Manhattan Railroad has not shared therein to the extent of a single penny, wholly because of its own dereliction. The record clearly belies any finding other than that the carrier is not efficiently and economically managed and therefore relief under Section 15a(2) cannot be accorded. Evidence with respect hereto is material and pertinent in this hearing. Without it the Commission was unable to make a proper revenue determination.

It is evident that if the Commission were to make appropriate findings, under Section 15a(2) of the Act it was necessary first to determine whether the carrier needed revenue. The Commission was unable to make such determination as the result of the September 28, 1943, hearing because no evidence was admitted relating to that fact. Appellees claimed and offered to prove that no additional

[1] This proceeding, commonly referred to as Ex Parte 148, was the result of an application by railroads generally for a rate and fare increase necessitated by labor increases and abnormal wartime operating costs. The Interstate Commerce Commission permitted increases in freight rates in an amount of 6% and in passenger fares in an amount of 10%.

Because of the upsurge in railroad revenue, resulting from increased traffic, the Interstate Commerce Commission revoked the authority (see infra under Point 7) previously granted for increased rates and fares and accordingly the 6% increase on freight rates, and the 10% increase on passenger fares insofar as they pertained to commutation fares, were cancelled.

revenue was needed. Appellant made no effort to sustain the burden of proof upon it by showing a current need for additional monies. There is nothing in the September 28, 1943, record which would permit the Commission to make a necessary revenue finding. The Commission is unable to make a finding allocating any revenue deficit, assuming that one existed because of this lack of data in the record necessary to establish the true facts relative to the various services of the railroad.

"A finding without evidence is beyond the power of the Commission." *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92. To determine whether the Commission acted within its powers the courts will determine whether there was substantial evidence to sustain the Commission's order. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541. The decision of the Commission cannot be sustained by the courts where the only reasonable deduction from the entire record is that the Commission has undertaken to support its findings (a) by arbitrarily permitting only selected evidence to be introduced into the record, which selected evidence was so selected because it and it alone would support the Commission's findings, and (b) by arbitrarily and completely rejecting and refusing to admit or consider all other evidence, solely because it conflicts with the Commission's findings.

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91;
The Chicago Junction Case, 264 U. S. 258, 265;
Consolidated Edison Company, et al. v. *National Labor Relations Board*, 305 U. S. 197, 229;

National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299; *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F (2d) 13, 15 (C.C.A. 6th, 1938).

While a court may not weigh the evidence before the Commission or substitute its judgment for that of the Commission as to the conclusions to be drawn from that evidence, a court may set aside an order of the Commission where, as here, it appears that, in making that order and the findings upon which it is based, the Commission itself neither weighed the evidence nor exercised any judgment based on the evidence, but made its findings in arbitrary and complete disregard of the evidence.

Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452, 470;
Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91.

(B) The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission because they were denied the right to introduce testimony and evidence which the Commission in its report and order of June 8, 1943, invited them to do and which went directly to the basis of that order.

In the report and order of the Interstate Commerce Commission dated June 8, 1943, it is stated:

"Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about 30 percent over that of 1941 in order to meet the current

interest requirements on its bonded indebtedness." (R. 255.)

Had plaintiff and intervenor not been precluded at the hearing commencing September 28, 1943, which resulted in the report and order of November 2, 1943, they would have established, as indicated by their offer of proof, that for the first six months of 1943, actual patronage figures show an increase over the corresponding period of 1941 of 30 percent. Therefore, predicated upon the railroad's own estimates (the 1943 patronage exceeds 1941 by 30 percent), it needs no other or additional revenue over that produced by the current downtown fare of eight cents, to pay the interest on its bonded indebtedness. Such interest on its bonded indebtedness was the full amount the railroad sought to recoup by means of an increased fare. Its aspiration is now fulfilled under existing fares. Accordingly, revenue needs cannot be used as justification for the prescription of a local downtown fare in excess of eight cents. The refusal of the Commission to accept testimony and evidence offered by appellees which would have established the patronage increase aforesaid, in view of the particular findings in the order of June 8, 1943, as above quoted, was arbitrary and unwarranted. The prescription of any fare in excess of eight cents whether it be in the order of June 8, 1943, August 3, 1943, or November 2, 1943, is in complete disregard of the evidence.

In its report and order of November 2, 1943, the Interstate Commerce Commission said:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held we would feel warranted in modifying our findings as made in the second report." (R. 275.)

The statement as above, particularly insofar as it refers to the exclusion of probative revenue evidence, the only evidence upon which a Section 15a(2) finding can be predicated, reflects arbitrary action. The railroad admits that all it needed was a 30 percent increase in patronage. The Commission refused to accept evidence establishing satisfaction of that need.

In this proceeding the Commission was required to make findings of the revenue needs of the railroad. However, even before receiving revenue evidence, it prejudged the disposition thereof:

Notwithstanding the direct expression of the clear right of any party to bring to the attention of the Commission facts of any changed revenue condition, as contained in the order of June 8, 1943, and notwithstanding the fact that a further hearing was actually held on September 28, 1943, the Commission, nevertheless, arbitrarily and in complete disregard of its own directive, precluded the appellees from presenting any of the revenue testimony and evidence which the Commission stated, in its report and order of June 8, 1943, it would receive.

The appellants inaccurately state our contention as to the denial of a fair hearing. In their briefs they repeatedly assert that appellees complain because of the failure on the part of the Commission *to reopen the hearings* for the purpose of receiving the testimony they sought to introduce in evidence. We make no such contention. The basis for appellee's complaint is that the Commission having voluntarily on September 18, 1943, opened the proceedings to receive evidence bearing upon the modified order of August 3, 1943, accepted and heard the evidence of the railroad but refused to receive evidence from the appellees.

Although the hearing Order of September 18, 1943, stated that the proceeding was reopened to permit any

party hereto to present evidence directed solely to the propriety and lawfulness of the modification made by the Commission in its report of August 3, 1943 (R. 351), the modifications made by the Commission were wholly and solely to increase the amount of the authorized railroad local downtown fare and such authorization was presumably predicated upon revenue requirements. It was wholly and solely with respect to the revenue requirements of the railroad that appellees' evidence and testimony were directed. It was wholly and solely at such reopened hearing that appellees sought to introduce their evidence and testimony. They did not, as the appellant contends, seek a further or additional hearing, in the first instance, to submit such testimony and evidence. Hence appellants' briefs, to the extent that they indicate that the Commission had the right to determine when to terminate the proceedings and the right to deny further hearings has no bearing on the appellees' endeavor to submit probative evidence and testimony at the reopened hearing of September 28, 1943. The Commission precluded the appellees from offering their testimony, notwithstanding the fact that it had theretofore stated in its order of June 8, 1943, (R. 248) that "it should be understood that if at any time prior to the expiration of that period (the duration of the war and six months thereafter), by reason of changed conditions or otherwise, the revenue result to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is, of course, at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

2.

By its hearing order of September 18, 1943, reopening the proceeding for further hearing on September 28, 1943, the Interstate Commerce Commission actually reopened the revenue phase of the proceeding.

The hearing order of September 18, 1943, reads as follows (R. 351):

> "Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,
>
> *It is ordered*, That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission."

The language of that rehearing order is clear and unequivocal. It provided that any party might be permitted to present evidence *directed to the propriety and lawfulness of the modifications* made by the Commission in its report of August 3, 1943. What were the modifications referred to? Obviously they consisted of an increase in the local downtown fare from nine cents to the alternative basis of eleven tokens for a dollar or a cash fare of ten cents payable by a dime. In other words it is obvious that the proceeding was reopened to permit evidence di-

rected to the propriety (and under the terms of the bearing order obviously to the impropriety) of a revenue increase.

This proceeding was and is an "investigation and suspension proceeding" instituted under United States Code Title 49, Section 15(7) as its title indicates. When the proceedings were reopened the problem for determination was whether the precise fare set forth in the order of August 3, 1943, was a proper fare to be established. That was the purpose for the hearing. The Commission's own past action clearly indicates that in an "investigation and suspension" proceeding the evidence is directed toward the prescription and establishment of a proper fare. In the original proceeding herein, resulting in the report and order of the Commission July 11, 1938 (R. 286), the existing fare was six cents. The proposed increased fare was ten cents. Ostensibly, under the present theory of the appellant, Interstate Commerce Commission, the evidence at that time, should have been restricted and confined wholly toward the propriety or the impropriety of the proposed ten cent fare. But it was not. The Commission prescribed a fare, for the future, of eight cents, a clear indication that it accepted the evidence and construed it as being applicable to all of the possible fares within the range between the six cent existing fare and the ten cent proposed fare.

Again, in the subsequent hearings, resulting in the report and order of the Commission of June 8, 1943, 255 I.C.C. 649 (R. 249), the existing fare was eight cents. The carrier again proposed a ten cent fare. The purpose of the hearing ostensibly, in view of the carrier's petition for a ten cent fare was to determine the propriety of the proposed ten cent fare. Was the testimony and evidence restricted wholly and solely to a ten cent fare? Obviously it was not, because the Commission prescribed a fare of nine cents.

As a matter of fact in both of the proceedings, as above, testimony and evidence was offered and received depicting

the situation under fares below the level of the then existing, effective fares. In other words the purpose of the hearing was to determine, from the mass of evidence to be produced, what a reasonable fare, under the circumstances, should be. No attempt was made by the Commission to prejudge its action by limiting the evidence to a preconceived reasonable fare. The determination of the reasonable fare was to flow wholly and solely from the evidence.

When the Commission issued its hearing order of September 18, 1943, did it on that date, and for the sole purpose of that one proceeding revolutionize its entire concept, powers and rights in an investigation and suspension proceeding by necessarily confining all evidence and testimony to establishing the propriety of a certain preconceived fare? If it did that, it would according to its own past contentions, be stripping itself of the power and stripping the parties to the proceeding of the right to effectively administer the provisions of Section 15(7) of the Act (U.S.C., Title 49, Section 15(7)).

Hence, in accordance with the construction of its powers since the inception of these proceedings, and by the rules of contemporaneous construction as to the powers of the Commission and its rights under Section 15(7) proceeding, the order of September 18, 1943, reopened the proceeding for the purpose of determining a reasonable maximum fare in accordance with the standards of the Act. It was not and could not properly be confined to any one fare or charge.

Even assuming that the proceeding of September 28, 1943, was confined, by the hearing order of September 18, 1943, wholly and solely to evidence relative to the propriety of an increase in fares to an alternative basis on the local downtown line of eleven tokens for a dollar or a cash fare of ten cents payable only by a dime, the Commission was

bound to accept evidence that the carrier was procuring adequate revenues at the then current fare. The Commission was also required to receive evidence that any fare in excess of 9 cents was unreasonable. But instead, the only evidence the Commission received was that relating to the disability of the carrier. The reasonableness of the fare is in issue when the carrier seeks to increase it by any amount.

Does it not obviously follow that if the testimony and evidence establish that any fare in excess of eight cents is unreasonable that a fare of nine and one-eleventh cents or ten cents is surely unreasonable? Does it not follow that if a fare of eight cents produces adequate revenues to meet current obligations that a fare of nine and one-eleventh cents or ten cents produces more than sufficient revenues to meet current operating obligations?

If it is alleged that the carrier needs no additional revenue in order to meet its current operating obligations because a fare of eight cents produces the necessary revenues, does it not necessarily follow that a fare of nine or nine and one-eleventh cents or ten cents produces more? To prove that a fare of nine and one-eleventh cents is unreasonably high is it incompetent evidence to so establish by attempting to prove that any fare in excess of eight cents is unreasonably high? If it is contended that the carrier does not need the revenues produced by a fare of nine and one-eleventh cents to meet current operating expenditures, is it incompetent evidence to establish that, by showing that an eight cent fare produces sufficient revenues?

To ask the questions, as above, is to answer them. In the last analysis the issue here presented is not whether the proof appellees sought to present at the hearing of September 28, 1943, was incompetent and immaterial because it directly related to fares of eight, nine and ten cents, but

whether the evidence was admissible at the September 28, 1943, hearing, under the provisions of the hearing order of September 18, 1943, to establish the revenue situation of the carrier as then existing and the propriety of the establishment of the fare under consideration or higher or lower levels thereof.

The hearing examiner admitted that such testimony and evidence was an actual part of the issues involved (O. R. U., p. 2186). Then why was it precluded? That is the reason we contend and have contended that we have been deprived of our day in Court and a full and fair hearing.

3.

The Commission's order of November 2, 1943, makes findings of fact allegedly predicated upon the evidence of record. But neither the findings of fact nor the evidence of record are within the confines of the Commission's legal authority under Section 15a (2).

The basic findings of the Commission in the report and order of November 2, 1943 are as follows:

1. "It is impracticable for respondent to collect a cash fare of 9 cents." (R. 276.)
2. "There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens." (R. 277.)
3. "The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable." (R. 278.)
4. "The use of an alternative-fare basis of 11 tokens for $1. or a cash fare of a dime for local interstate

passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation services." (R. 278.)

5. "The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act." (R. 282.)

6. "A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally." (R. 283.)

The findings 1 to 4 inclusive, in the order of November 2, 1943, was predicated upon a request made by the railroad for increased fares allegedly because of a carrier disability. Appellees before the Commission disputed the existence of any such carrier disability. Nevertheless, even assuming the existence of the carrier disability, the Commission is nowhere authorized under the Act to relegate the passengers' right to a reasonable fare to a position subordinate to an alleged carrier disability. The Act provides that every passenger is entitled to a reasonable fare. It precludes the Commission from denying the passenger his inherent right. To the extent that the Commission disregards that passenger right and makes it subordinate to a purported carrier disability it committed grievous error.

United States v. *Northern Pac. Ry. Co.*, 288 U. S. 490;

Montana-Dakota Power Co. v. *Chicago & N. W. Ry. Co.*, 198 I.C.C. 557 (563);

Mountain-Pacific Oil Cases, 192 I.C.C. 599;
E-Z-Opener Bag Co. v. *Illinois Central R. Co.*, 160 I.C.C. 37;
Welch & Welch v. *Southern Pac. Co.*, 142 I.C.C. 267;
Consolidated Southwestern Cases, 123 I.C.C. 203;
Coke Producers' Assn of Connellsville v. *Baltimore & O. R. Co.*, 27 I.C.C. 125.

There is nothing in the Act which permits the Commission to make findings 1 to 4 in a revenue proceeding. The impracticability of passenger fare collecting devices, carrier's disability with respect to accounting methods, and the desire of the railroad to adopt tokens can never justify increased fares under Section 15a(2) or departures from the other standards of regulation set forth in the Act. The only way increased fares could have been authorized by the November 2, 1943, decision was and is necessarily the result of findings of (1) revenue need, (2) the propriety of allocating such revenue need against the local downtown traffic and (3) efficient and economical management of the Hudson & Manhattan Railroad. Such findings were not made. The state of the record precluded them.

While the courts are not concerned with the correctness of the reasoning by which the Commission reaches its conclusions, this obviously means only, if there is substantial evidence to support the Commission's conclusions, the courts will not set them aside merely because the Commission has reached the right conclusions by wrong reasoning. This does not mean that the courts are not concerned where, as in this instance the Commission has reached wrong conclusions, by attributing to evidence, through wrong reasoning, substantial probative value which by right reasoning such evidence is entirely lacking.

Consolidated Edison Company et al. v. *National Labor Relations Board*, 305 U. S. 197; 229;
Virginian Railway Company v. *United States*, 272 *U. S.* 658, 663, 665-666;
Western Paper Makers' Chemical Company v. *United States*, 271 U. S. 268, 270-271;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91.

The Commission's endeavor to justify the ten cent fare in finding number 6 of its report and order of November 2, 1943, is purely arbitrary and capricious. The evidence and testimony of record that resulted in the November 2, 1943, order were and are precisely the same as that which existed in the record at the time of the Commission's report and order of July 11, 1938, 227 I. C. C. 741, which resulted in a finding that the ten cent fare on the local downtown line was illegal, in violation of Section 1 of the Act. Such finding of the Commission was sustained by this court, *Hudson & Manhattan R. Co.* v. *United States, supra.* The record indicates no change in the factual circumstances, and thus the previous report and order of the Commission are still *res judicata.*

While the courts have held that they are not concerned with the inconsistencies between the Commission's findings in a particular case and its findings in other proceedings, this is merely a recognition that the doctrine of *stare decisis* does not necessarily apply to decisions of administrative bodies on administrative questions. It does not preclude the recognition, however, that such inconsistencies, taken in connection with indicia, may constitute cumulative evidence that the Commission's determination in the particular case was wholly arbitrary and capricious.

Passenger Fares and Surcharges, 214 I.C.C. 174;
York Valley Lime & Stone Company, Inc., v. *Pennsylvania Railroad Company*, 186 I.C.C. 763;
Armour & Company v. *Central of Georgia Railway Company*, 81 I.C.C. 33;
Interchangeable Mileage Ticket Investigation, 71 I.C.C. 200;
Natchez Chamber of Commerce v. *Arkansas Harbor Terminal Railway Company*, 58 I.C.C. 310;
Memphis-Southwestern Investigation, 55 I.C.C. 513;
Natchez Chamber of Commerce v. *Louisiana & Arkansas Railway Company*, 52 I.C.C. 105;
St. Louis-Missouri-Illinois Passenger Fares, 41 I.C.C. 584;
Commutation Fares to and from Washington, D. C. 35 I.C.C. 428;
East Dubuque Supply Company v. *Illinois Central Railroad Company*, 28 I.C.C. 425;
The Commutation Rate Case, 21 I.C.C. 426;
Sprigg v. *Baltimore & Ohio Railroad Company*, 8 I.C.C. 443.

As a correlated justification submitted by the railroad for the increase in the downtown fare as approved by the Interstate Commerce Commission, it was suggested that the uptown current ten-cent fare be reduced to the same as that applicable on the downtown line. The Commission in its report and orders of August 3 and November 2, 1943, sought to justify the increase in fares on the downtown line by the corresponding reduction made in the fares on the uptown line[1]. It is axiomatic that every passenger is entitled to a

[1] The uptown fare is not and never has been in issue in this proceeding.

reasonable fare for the particular service involved, irrespective of the level of or earnings produced by fares on some other branch of the railroad.

W. P. Brown & Sons Lbr. Co., Inc. v. *Mobile & O. R. Co.*, 181 I.C.C. 298;
Linton Lbr. Co. v. *Baltimore & O. R. Co.*, 177 I.C.C. 231 (232);
Republic Creosoting Co. v. *Akron, C. & Y. Ry. Co.*, 169 I.C.C. 161;
Sawyer Goodman Co. v. *Chicago, Mo., St. P. & P. R. Co.*, 168 I.C.C. 558 (580);
O. A. Smith Agency, Inc. v. *Atlantic Coast Line R. Co.*, 160 I.C.C. 61;
A. H. Belo Corp. v. *Arkansas & L. M. Ry. Co.*, 160 I.C.C. 77;
Cynamid and Crude Cyanide from Niagara Falls, 155 I.C.C. 488.

The Interstate Commerce Commission in all its findings in these proceedings found that the ten-cent local fare on the downtown line is excessive, unreasonable and in violation of Section 1 of the Act. Such finding was affirmed by this court, *Hudson & Manhattan R. Co.* v. *United States*, *supra*. At the same time the Commission and the courts found that the assessment of a ten-cent fare for the local downtown service in the face of the maintenance of a similar fare on the uptown line constituted undue preference of the uptown passenger and undue prejudice to the downtown passenger. Yet, on the same set of physical structural facts this Commission would now authorize the establishment not only of a ten-cent fare on the downtown line to be used in conjunction with the sale of eleven tokens for one dollar, but in addition the same fare for the uptown line. The at-

tempted prescription as aforesaid, heretofore condemned by the Commission and the courts, is made in the face of the following facts: the average distance from all of the New Jersey stations to the downtown terminus is 2.25 miles, whereas the average distance to the uptown lines terminus averages 4.24 miles with a maximum distance of 5.71 miles. The scheduled running time on the downtown line is 6.4 minutes as against 16.2 minutes on the uptown line, indicative of the amount of the respective services rendered. The daily number of passengers per car trip on the downtown line averages 39.3 as against 24.3 on the uptown line. The operating expense per passenger on the downtown line is 5.16 cents as against 9.73 cents on the uptown lines. The operating ratio of the railroad is 42.7 per cent on the downtown line and 78.9 per cent on the uptown line. In 1941 the downtown branch produced net revenue of $1,707,466. available for bond interest, as against a deficit in the uptown line of $17,435.

Moreover, it was improper for the Commission to justify the increase in the local downtown fare by a reduction of fare on the uptown line because nowhere in the proceedings before the Commission was there any evidence relative to the revenues or traffic situation of the Hudson & Manhattan Railroad with respect to its uptown line. No party to this proceeding ever considered the uptown line in issue. No evidence was submitted by anyone with respect thereto. Any finding or ruling by the Commission with respect to the uptown line is a finding wholly unsupported by the evidence of record.

> "A finding without evidence is beyond the power of the Commission."
>
> *Interstate Commerce Commission* v. *Louisville & Nashville R. Co., supra.*

Accordingly the findings with respect to the uptown line were wholly immaterial and offered no justification for the adjustments sought to be made in the downtown local fares. Therefore, the proposal of the appellant, adopted by the Interstate Commerce Commission, to increase the local downtown fare because of a contemplated reduction in the uptown fare is wholly without merit and finds no support in the Act.

4.

Before appellant railroad is entitled to any increased fares under the revenue section of the Act it must, among other factors, affirmatively establish its need of revenues sufficient to enable it, under honest, economical and efficient management to provide adequate service at the lowest cost consistent with such service.

As hereinbefore indicated this entire proceeding is in the form of a revenue case and its disposition is subject to the provisions of Section 15a (2) of the Interstate Commerce Act (U.S.C., Title 49, Sec. 15a(2)). That section provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service."

Predicated, as it is, upon this section the only revenue that the Commission can authorize upon a proper showing, is revenue sufficient to provide railroad service, or in other words revenue sufficient to meet current obligations. And even revenue sufficient to meet current obligations cannot be prescribed by the Commission, under this section, unless it is affimatively established that the carrier is "under honest, economical and efficient management." The carrier's dereliction with respect to its joint interline traffic compensation is in and of itself ample justification to establish its lack of honest, economical and efficient management, especially in view of the fact that the Commission in each of its orders in this proceeding (Report and Order July 11, 1938 R. p. 286, 311, affirmed, *Hudson & Manhattan R. R. Co.* v. *U. S.*, 33 Fed. Supp. 495, *Hudson & Manhattan R. R. Co.* v. *U. S.*, 313 U. S. 98; Report and Order of June 8, 1943 R. p. 248, 270; Report and Order of August 3, 1943 R. p. 313, 325) directed the railroad to seek additional revenue from that direction.

The Appellees repeatedly requested the Interstate Commerce Commission to make a specific finding relative to the management of the appellant railroad because the record would support no finding other than that the railroad was not honestly, economically and efficiently managed. Without an affirmative finding by the Commission that the carrier is "under honest, economical and efficient management" there is no justification under the statute and particularly under Section 15a(2) for the Interstate Commerce Commission to authorize increased fares as a revenue measure.

We do not dispute the appellant's contention that any carrier is able to charge just and reasonable fares and that it is entitled to a fair return on its investment if under just and reasonable fares it can earn such a return. The

appellees submit that the eight cent local downtown fare authorized by the Interstate Commerce Commission in its report and order of July 11, 1938 (R. 286) reflects the full maximum reasonable fare. If that maximum reasonable fare earns a fair return on the railroad investment then the railroad is definitely entitled thereto. The issue in this proceeding is not whether the fare of nine cents, nine and one-eleventh of a cent or ten cents represents a maximum reasonable fare. The carrier made no attempt to establish that fact. The issue before the Interstate Commerce Commission was and is whether the carrier should be granted the right to increase its fares wholly by virtue of the authority set forth in Section 15a(2). Section 15a(2) does not require nor authorize the Interstate Commerce Commission to prescribe fares in excess of the reasonable maximum fares for the purpose of permitting a carrier to earn a fair return. Its sole purpose is to permit the carrier to continue to render transportation service to the extent and degree of its current operations. This means that the carrier under Section 15a(2) is to be granted only enough to meet current obligations and then only if all of the provisions presented by Section 15a(2) are met.

There is nothing in the law that would require or permit the Interstate Commerce Commission to guarantee unto a carrier a fair return by taxing one portion of the carrier's entire facilities in an unjust and unreasonable manner. That is precisely what the Hudson & Manhatten Railroad asked the Interstate Commerce Commission to do in connection with the downtown local patronage. In view of the Commission's previous findings "that under normal circumstances the saturation point in increased fares (referring to the eight cent fare) on that traffic (referring to the downt wn traffic) has about been reached" (R. 270), it would appear that the Commission in contradiction of its

own prior finding would now impose the entire burden of providing a fair return to the carrier upon the downtown local patron, in conformity with the railroad's contention but in contravention to the provisions of Section 15a(2).

It has been and is the position of the appellees that the appellant could secure a fair return on its investment without any increase in the downtown line fare over and above the current eight cent fare if its divisional arrangements with the Pennsylvania Railroad were established on a proper, equitable and just basis. Such adjustment in interline traffic divisions would satisfy the directives of the Interstate Commerce Commission as aforesaid, and would remove from the carrier the stigma of managerial dereliction which now attaches to it.

Realizing that it was error for the Commission to have refused to entertain the evidence which would have established a 30% increase over 1941 traffic, and hence satisfy the revenue required to meet the interest on bonded indebtedness, the railroad now urges that (a) the Commission could not legally limit appellant to its present eight cent fare merely because appellant, due to increased 1943 traffic might, under such fare earn its current bond interest[1] (Railroad's brief, p. 61). The fact of the matter is that the Commission could have legally limited and would in fact be required to limit the appellant to such fare, under Section 1 of the Interstate Commerce Act (U.S.C. Title 49 Sec. 1), where to permit a fare in excess thereof would have resulted in an unreasonable and

[1] When the railroad sought its increase resulting in the Order of June 8, 1943, the railroad predicated its right to an increase on increased operating expense and bond interest. The Commission stated the position of the railroad as follows: "The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest of its bonds" (p. 269).

therefore illegal fare. The Interstate Commerce Commission could not have legally permitted an increase in a fare under Section 15a(2) of the Interstate Commerce Act (U. S. C., Title 49 15a(2) unless it found: (1) revenue need; (2) that the carrier was under honest, economical and efficient management; and (3) that the revenue so needed was necessary to continue the operations of the road, or in other words, to meet current obligations.

Appellant railroad further claims that (b) the Commission could not have legally limited nor did it intend to limit appellant to the revenues which in the report of July 11, 1938, it estimated appellant would earn under such eight cent fare. (Railroad's brief p. 67.) The intention of the Interstate Commerce Commission is set forth in full in its report of July 11, 1938. It clearly stated in unequivocal language that the eight cent fare therein proposed would produce annual revenue available for bond interest of $2,260,817 (R. 311), or $541,000 less than required. Such limitation proposed by the Commission upon the Hudson & Manhattan Railroad's local downtown revenue was upheld by the Courts, *Hudson & Manhattan* v. *U. S.* 33 Fed. Supp. 495; *Hudson & Manhattan R. R. Co.* v. *U. S.* aff'd 313 U. S. 98. That the Commission intended that the carrier would be limited to the revenues under the downtown local fares in the manner as aforesaid is further indicated by its directive to the Hudson & Manhattan Railroad to seek a further increase in revenue from its interline traffic. (R. 311.)

Appellant finally contends that (c) the Commission could not legally have limited nor did it intend to limit appellant merely to the revenues which the Commission in its report of June 8, 1943 estimated appellant would earn under the nine cent fare therein authorized (Railroad's brief, 67). That the Commission intended the carrier to be so limited

is indicated by the directive to the carrier to seek any and all additional revenues that it might require from its joint interline traffic. (R. 270.)

The legality of the Commission's limitation of revenues under the nine cent fare is no different from its limitation under the eight cent fare indicated above, which limitation was reviewed by the courts and found proper.

5.

The imposition of a cash fare of ten cents for any downtown local service is unreasonable and unduly discriminatory and in violation of the Interstate Commerce Act.

The report and order of the Interstate Commerce Commission dated July 11, 1938, which were the subject of review and affirmance by this Court contained the following finding:

> "In this connection, however, it is noteworthy that the cost per passenger to respondent in the uptown service is evidently substantially greater than that in the downtown service. This is apparent, not only from the difference in the hauls, but from the number of passengers per car transported on the respective lines. Thus, during the morning and evening peak traffic the average number of passengers per car to and from New York on a typical week day is, respectively, 80.8 and 85.8 downtown and 53.1 and 73.3 uptown; and during the 24-hour period, 42.2 downtown and 22.8 uptown. The combined average of the two is 34.6 passengers per car. From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem

that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents." (R. 301.)

It is apparent from the above quotation that the unreasonable and discriminatory nature of the proposed ten cent downtown local fare flows directly from the similarity or sameness of that fare with the existing uptown fare and this because of the substantial difference in the services rendered to the downtown against the uptown patrons. The unreasonableness here is one of relativity. Conjecture, seeking to determine what a maximum reasonable fare for the uptown service may be, is meaningless. The reasonable uptown fare was and always has been ten cents. "A rate established by the carrier within the limits of the Commission's order becomes a lawful, that is, a reasonable rate." *Arizona Grocery Co. v. Atchison T. & S. F. Ry Co.*, 284 U. S. 370. It is only the existing fare that affords the proper basis for comparison.

The test in the instant case is the measure of the downtown proposed fare compared with the existing uptown fare. Such comparison is the best test of reasonableness. The Act recognizes no distinction between relative unreasonableness and intrinsic or absoluate unreasonableness. *Illinois Cork Co. v. Akron C. & Y. Ry. Co.* 200 I.C.C. 381.

That which the Commission and the courts condemned, namely the sameness of the fare on the downtown and uptown line is again proposed by the railroad and authorized by the Commission, even though not a single change has occurred in any of the basic facts that heretofore resulted in condemnation of the ten cent proposed downtown fare in the face of the concurrent ten cent uptown fare.

Moreover, the Commission has affirmed and re-affirmed its determination, in all of the orders and reports dealing

with a ten cent fare on the downtown line, that the imposition of a ten cent fare for that service is unreasonable, and because of its unreasonableness has refused to authorize it. Yet by this very modified order of November 2, 1943, it did the very thing it has repeatedly condemned and imposed a downtown fare of ten cents.

6.

The appellees exhausted all administrative remedies before instituting proceedings in the District Court.

Following the railroad's petition of July 27, 1942, for rehearing and the holding of further hearings as the result thereof, the Commission issued its report and order of June 8, 1943, 255 I.C.C. 649. Therein it affirmed its original conclusion that the ten cent fare proposed for application on the local downtown interstate line had not been justified. A nine cent fare was prescribed for the duration plus six months thereafter. Subsequent thereto, on July 8, 1943, the railroad filed an additional petition seeking reconsideration and modification of the findings of the Commission in its June 8, 1943 order, because of certain alleged carrier disabilities which it was claimed precluded the carrier from satisfactorily collecting the nine cent fare. Although the appellees seasonably answered that petition and requested the Commission to assign the matter for further hearing before taking any affirmative action, so as to accord all parties their proper and due day in court, the Commission nevertheless, without further hearing or other action, issued its report and order on reconsideration dated August 3, 1943. Therein, with one stroke of the pen, the Commission destroyed all which

had been determined from a full hearing before the Commission. Although the report of August 3, 1943, affirmed the previous finding that the proposed ten cent fare had not been justified for *general* application on the local downtown interstate line, it permitted an increase over and above the fare of nine cents theretofore prescribed, by authorizing an alternative fare basis of eleven tokens to be sold for one dollar or a cash fare of ten cents payable only by a dime. Without the receipt of any further and additional evidence, the Commission arbitrarily and capriciously, while finding that a ten cent local interstate downtown fare had not been justified, actually authorized the application of a ten cent fare as an alternative basis.

The action of the Commission in its report and order of August 3, 1943, was so unorthodox that the only avenue of relief available to the appellees was resort to court action. A bill of complaint was filed by the City of Jersey City on September 13, 1943, in the United State District Court for the District of New Jersey seeking to have the order of August 3, 1943, enjoined. Before hearing on that bill of complaint and corollary application for a temporary restraint, the Interstate Commerce Commission, on its own motion, reopened its order of August 3, 1943, and set the matter for further hearing. As evidence of the Commission's fixed attitude in connection herewith reference need only be made to the order reopening the August 3, 1943, decision and setting the matter for further hearing. The whole intent and purport of the reopened hearing, as subsequently established, was not to accord the appellees their requisite day in court, but to secure evidence and facts from appellant railroad to justify the Commission's conclusions. Constantly throughout the hearings objections were made to the circumscribed scope thereof. Con-

stantly and repeatedly efforts were made to introduce probative testimony and evidence. The propriety and urgency of such action was conveyed to the presiding examiner and he was, in turn, requested to convey such requests to the Commission. All this was to no avail.

On October 14, 1943, shortly after the hearing of September 28, 1943, appellee, Office of Price Administration filed a formal motion with the Interstate Commerce Commission for reopening of the proceeding:

> "For the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues, over and above those in effect on September 15, 1942, under the Interstate Commerce Act and the Act of October 2, 1942." (R. 275.)

On October 25, 1943, the City of Jersey City adopted and otherwise ratified the aforesaid motion of the Office of Price Administration as though it were its own. (R. 389.)

In filing the motion, as aforesaid, after appellees were denied the right of introducing testimony in an orderly manner in the reopened hearing of September 28, 1943, reliance was placed, in part, upon the Commission's statement in its order of June 8, 1943, 255 I.C.C. 649 that any party was at liberty to bring to the attention of the Commission changed conditions. (R. 271.)

In its report and order of November 2, 1943, the Commission disposed of the aforesaid motion by stating:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearings sought were

held, we would feel warranted in modifying our findings as made in the second report." (R. 275.)

Not only did the Commission clearly indicate, by the above quoted statement, that it would not entertain any further or additional petitions or motions for further hearing and that such new evidence would not be received, but it went further and permitted the carrier to file and make effective the new tariffs on fifteen days notice. The Commission then took the position that it was without power to further suspend the tariffs. It is apparent that had the appellees individually or jointly filed an additional petition or motion with the Interstate Commerce Commission it would merely have been a futile gesture. It is a fundamental rule of law that no litigant need perform an act which would in effect be a mere useless ceremony.

Nowhere do the statutes require that litigants must request a rehearing of the Interstate Commerce Commission before suit may be instituted in the courts. In *Baltimore & Ohio R. R. Co.* v. *U. S.*, 298 U. S. 347, 371, the Supreme Court held:

> "No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the Commission prescribing rates or divisions."

We respectfully submit that the appellees completely exhausted all of their administrative remedies. They had no other recourse than to go before the District Court.

7.

Jersey City was not estopped from either asking the Commission to receive the tendered evidence or from seeking an injunction based on the Commission's refusal to receive such evidence, nor is it estopped from seeking an injunction against the order of the Commission of June 8, 1943.

The Interstate Commerce Commission in its report and order of June 8, 1943, in finding that the proposed ten cent passenger fare for application on the local downtown line had not been justified did so without prejudice to the establishments of a local downtown fare of nine cents. Shortly prior thereto the Interstate Commerce Commission in *Increased Railway Rates, Fares and Charges, 1942*, 255 I.C.C. 357, found, in a report and order decided April 6, 1943, and formally distributed several weeks thereafter that the increased fares, rates and charges that had been previously authorized because of abnormal war time conditions were, in large part, no longer necessary nor justified. In so finding the Commission said:

> "Government authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or if for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel.
>
> "Commutation travel is confined largely to the few local areas in the vicinity of large cities. It is gov-

erned mainly by local conditions rather than considerations that must control when the body of freight rates and passenger fares as a whole is under review. The commutation traffic undoubtedly has been subjected to increased costs, similar to those borne by other traffic, but whether the conditions under which the services are rendered and the volume of traffic offset these increased costs remains somewhat in doubt. The question whether the basic commutation fares should be increased requires further investigation. We therefore shall resume investigation of commutation fares at the stage where this proceeding began, and will invite the cooperation of the regulatory bodies of the States particularly interested, with a view of determining what, if any, changes should be made in these fares in order that the national transportation policy may be carried out and an adequate transportation system and essential commutation service may be maintained during the war emergency.

"We find that no modification of our previous findings, orders and authorizations respecting the present interstate standard passenger fares is necessary. We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked, and that the question whether any increase should be made therein, in order to accomplish the purposes of the national transportation policy and the Interstate Commerce Act, should be investigated further by us as respects interstate commutation transportation. In that investigation, which will be independent of the present proceeding, as above indicated, we shall invite the cooperation of the regulatory authorities of the State as concerns their intrastate commutation traffic."

It is conceded by all parties to this proceeding that the traffic of the Hudson & Manhattan Railroad is fundamentally and preponderantly commuter traffic. The railroad is an electric interurban commuter line. That being

the case the findings relative to commuter traffic and commutation fares in the proceeding above quoted, must apply equally to the commuter traffic and fares of the Hudson & Manhattan Railroad.

It was apparent to the appellees that the Commission in promulgating its report and order of June 8, 1943, as aforesaid, failed to give consideration to its own action of April 6, 1943 in *Increased Railway Rates, Fares and Charges, 1942, supra,* wherein it revoked commutation fare increases in that it stated in its June 8, 1943 report:

> "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

The appellees had available to them the alternative procedure of filing a petition with the Commission for reopening and reconsideration of its report and order of June 8, 1943, or of awaiting the publication of the nine cent fare in tariff form as required by the Act (U.S.C. Title 49, Sec. 6(1)) and prior to the effectiveness thereof requesting suspension in accordance with the provisions of the Interstate Commerce Act (U.S.C. Title 49, Sec. 15(7)). It chose the latter course as the most expedient and proper. It accordingly awaited the publication of the nine cent fare in tariff form. That nine cent fare was never so published, and hence the appellee never had the opportunity of requesting suspension to consider the propriety of the establishment of the nine cent fare in view of the changed facts and conditions, namely, the revocation of the authorization by the Interstate Commerce Commission to the railroads to increase their com-

muter passenger fares 10% as indicated in the excerpt hereinbefore quoted.

In lieu of the publication and filing of a nine cent fare in tariff form as prescribed by the statute, the appellant railroad filed its petition of July 8, 1943, seeking reconsideration and modification of the findings of the Commission contained in the report and order of June 8, 1943. That petition sought through the medium of an affidavit attached thereto, to secure a modification of the order of June 8, 1943, and an increase in the authorized nine cent fare without the necessity of the usual customary formal hearing. The appellant sought to accomplish this by attempting to formulate its own rules of practice. It demanded the appellees to reply to its petition by a verified answer even though the general rules of practice of the Interstate Commerce Commission do not require such a verification. When appellees replied, the railroad did not formally object to the lack of the verification.

When the Interstate Commerce Commission on August 8, 1943, predicated upon the petition of the appellant railroad, as aforesaid, revised its order of June 8, 1943, by increasing the authorized fare consistent with the request of the railroad, it became apparent that the filing of a petition for reopening and rehearing would be futile. Resort was had to the courts, not for the purpose of testing the level of the rate prescribed or the sufficiency of the evidence upon which that report was based but rather for the sole purpose of assuring to the appellees their requisite day in court and a full and fair opportunity to be heard on all of the material and probative evidence. The original complaint filed in this suit was to that effect.

Thereafter, the Interstate Commerce Commission, taking full cognizance of the propriety of the appellee's

allegations as contained in that complaint and in acknowledgment thereof, of its own motion reopened the proceedings for further hearing. The hearing of September 28, 1943, followed. The attitude of the Commission and its predetermination of all of the material issues herein was evident from the very opening of that hearing. At the conclusion of such hearing and after the promulgation of the Commission's report and order of November 2, 1943 (R. 272), the appellees being thoroughly convinced that it would be futile to further address the Commission on the materiality of the revenue issues which they contended should necessarily have been incorporated in the record and made the basis for any proper revenue finding, filed its amended complaint in the District Court. Such amended complaint, among other things, attacked the propriety of any fare in excess of eight cents, the fare then in effect and necessarily brought into question the order of June 8, 1943, which authorized a fare in excess of eight cents.

The appellants' endeavor to set up the doctrine of estoppel as a barrier to the appellees, in view of the facts as aforesaid, is without foundation.

Conclusion.

It is respectfully submitted that the decree of the lower court enjoining the orders of the Commission insofar as they increased the fare over eight cents should be affirmed so that the *status quo* may be maintained until such time as the Interstate Commerce Commission affords to the appellees a full and fair hearing. The decree of the lower court specifically remanded the proceedings to the Interstate Commerce Commission for further hearing and reconsideration (R. 220). An injunction pending the further

hearing was necessary in order to prevent the higher fare from going into effect. Compliance with this provision of the decree is not only necessary but would have been the logical and simple procedure to follow. Instead, both appellants burden this court with an appeal.

Respectfully submitted,

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